136

Supreme Court, U.S.
FILED

NO. 09-106 AUG 13 2009

OFFICE OF THE CLERK
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In The
Supreme Court of the United States

MIRIAM ROSARIO COLON,
a/k/a Annamaria Lopez,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arthur Ladds
Counsel of Record
ATTORNEY AT LAW
521 Fifth Avenue
New York, New York 10175
(212) 292-4444

Counsel for Petitioner

Dated: August 13, 2009

THE LEX GROUP DC ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006 (202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

Whether the failure to properly address the weight of Petitioner's psychological/family assessment and state of mind violated Petitioner's due process, as the evidence presented by Petitioner addressed the concern that there "existed no evidence" that corroborated the petitioner's memory loss, and the agency's refusal to permit the petitioner to offer further evidence related to her state of mind at the time of her plea violated her due process rights when the petitioner was not permitted to fully develop the record in an effort to present her relief from removal?

STATEMENT PURSUANT TO RULE 29.6

Petitioners do not own any share in any publicly held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 3

ARGUMENT 3

THE SECOND CIRCUIT'S ERROR TO ADDRESS THE PROPER WEIGHT OF THE PSYCHOLOGICAL/FAMILY ASSESSMENT IN CORROBORATING PETITIONER'S MEMORY LOSS, AND THE ERROR IN THE REFUSAL TO PERMIT PETITIONER TO OFFER EVIDENCE RELATED TO HER STATE OF MIND AT THE TIME OF HER PLEA VIOLATED HER DUE PROCESS RIGHTS WHEN THE PETITIONER WAS NOT PERMITTED TO FULLY DEVELOP THE RECORD IN AN EFFORT TO PRESENT HER RELIEF FROM REMOVAL.....4

CONCLUSION.....11

APPENDIX:

Summary Order of
The United States Court of Appeals for the Second Circuit
entered May 15, 2009.....1a

Decision of
The Board of Immigration Appeals
entered May 5, 2008.....6a

Oral Decision of
The Immigration Judge
entered February 5, 2007.....9a

Order of
The Immigration Judge
entered February 5, 2007 ..... 17a

Affidavit of
Doris Hernandez
sworn April 26, 2007 ..... 20a

TABLE OF AUTHORITIES

Page(s)

CASES

Agyeman v. INS,
296 F.3d 871 (9th Cir. 2002).....5, 8

Batanic v. INS,
12 F.3d 622 (7th Cir. 1993).....11

Bhuiyan v. Gonzales,
231 Fed. Appx. 28 (2d Cir. 2007) 6

Castaneda-Suarez v. INS,
993 F.2d 142 (7th Cir. 1993).....5

Colmear v. INS,
210 F.3d 967 (9th Cir. 2000).....5

Dia v. Ashcroft,
353 F.3d 228 (3d Cir. 2003).....7, 8

Doe v. Simon,
221 F.3d 137 (2d Cir. 2000).....5

Jacinto v. INS,
208 F.3d 725 (9th Cir. 2000).....5

Jin Shui Qui v. Ashcroft,
329 F.3d 140 (2d Cir. 2003).....4

Kaweesa v. Gonzales,
450 F.3d 62 (1st Cir. 2006).....7

Kerciku v. INS,
314 F.3d 913 (7th Cir. 2003) 10, 11

Khouri v. Ashcroft,
362 F.3d 461 (8th Cir. 2004) 5

Longwa v. Gonzales,
193 Fed. Appx. 104 (2d Cir. 2006) 6

Morrissey v. Brewer,
408 U.S. 471 (1972) 5

Pyler v. Doe,
457 U.S. 202 (1982) 5

Reno v. Flores,
507 U.S. 292 (1933) 5

Shaugnessy v. U.S. ex rel. Mezei,
345 U.S. 206 (1953) 5

U.S. v. Fernandez-Antonia,
278 F.3d 150 (2d Cir. 2002) 5

Zubeda v. Ashcroft,
333 F.3d 463 (3d Cir. 2003) 7, 8

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V 4, 5

STATUTES

I.N.A. § 212(c) 1, 2, 3

I.N.A. § 240(b)(2) 8

I.N.A. § 240(b)(4) 8

8 U.S.C. § 1182(c) 1

8 U.S.C. § 1229a(b)(1) 8

8 U.S.C. § 1229a(b)(4) 8

28 U.S.C. § 1254(1) 1

REGULATION

8 C.F.R. § 240.10(a)(4) 8

OTHER AUTHORITIES

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders ("DSM")(3d Ed. 1980) 7

NY Penal Law § 110/220.39 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The immigration Judge's opinion denying petitioner's cancellation of removal and INA § 212(c) relief. The Board of Immigration Appeal's decision affirming the Immigration Judge's decision. United States Court of Appeals for the Second Circuit's summary opinion denying the Petition for Review.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Summary Opinion on May 15, 2009, denying Petitioner's Petition for Review. (A. 1a) Petitioner's invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [other than

> subparagraphs (A), (B), (C) or (E) of paragraph (3). . . The first sentence shall not apply to an alien who has been convicted of an aggravated felons and has served a term of imprisonment of at least 5 years.

STATEMENT OF THE CASE

The petitioner, Miriam Rosario Colon, is a native and citizen of Bolivia. Ms. Colon was placed in removal proceedings with the service of Notice to Appear that charged him being a deportable alien by virtue of her conviction for the offenses of Attempted Sale of a Controlled Substance in the Third Degree, in violation of Section 110/220.39 of the New York State Penal Law.

A hearing was held on the merits of her § 212(c) and cancellation of removal applications on June, 1, 2006, that was continued until February 5, 2007. In a decision dated February 5, 2007, the Immigration Judge denied Ms. Colon's applications reasoning that she failed to establish that she was ever lawfully admitted as a lawful permanent resident. (A. 9a)

Ms. Colon appealed the IJ's decision to the Board of Immigration Appeals. On May 5, 2008, the Board adopted the IJ's decision and dismissed Ms. Colon's appeal. (A. 6a) The Petitioner then filed a Petition for Review with the United States Court of Appeals for the Second Circuit, which denied the Petition on May 15, 2009. (A. 1a) The U.S. Court of Appeals for the Second Circuit sustained the Immigration Judge's finding that, despite evidence

presented that Petitioner was a battered woman who was suffering from Post Traumatic Stress Disorder as defined by the American Psychiatric Association's Diagnostic and Statistical Manual at the time of her conviction and petition for permanent status, Petitioner, Ms Colon, was statutorily ineligible in seeking cancellation of removal and relief under INA, § 212(c).

This Petition for a writ of certiorari followed.

REASON FOR GRANTING THE WRIT

The Second Circuit decision erroneously and conflictingly determined that Petitioner had a full and fair opportunity to present her claims by affirming the IJ and BIA's decision to deny hearing Petitioner's supporting affidavit to present further evidence to corroborate her memory loss as a result of abuse, because it was "determined that petitioner had not demonstrated why a remand for additional testimony was necessary", yet then conflictingly concluding that the IJ and BIA properly determined that there was no evidence to corroborate Petitioner's claim of memory loss.

ARGUMENT

The Second Circuit concluded that petitioner's psychological assessment "does not provide evidence to corroborate her claim of memory loss". The Circuit further concluded that "although the report does conclude that petitioner suffers from Posttraumatic Stress Disorder, it makes no connection between the disorder and memory loss".

The Court further concluded that, regarding the request for a remand to allow her sister-in-law to provide testimony of petitioner's abuse, "the BIA simply determined that petitioner had not demonstrated why a remand for additional testimony was necessary. Based on the record before us, we cannot conclude that the BIA's decision denied petitioner a full and fair opportunity to present her claims, or deprived her of fundamental fairness."

THE SECOND CIRCUIT'S ERROR TO ADDRESS THE PROPER WEIGHT OF THE PSYCHOLOGICAL/ FAMILY ASSESSMENT IN CORROBORATING PETITIONER'S MEMORY LOSS, AND THE ERROR IN THE REFUSAL TO PERMIT PETITIONER TO OFFER EVIDENCE RELATED TO HER STATE OF MIND AT THE TIME OF HER PLEA VIOLATED HER DUE PROCESS RIGHTS WHEN THE PETITIONER WAS NOT PERMITTED TO FULLY DEVELOP THE RECORD IN AN EFFORT TO PRESENT HER RELIEF FROM REMOVAL

The Second Circuit "will vacate BIA [or IJ] conclusions.....that a perfectly reasonable fact-finder could have settled upon, insofar as the BIA [or the IJ] either has not applied the law correctly, or has not supported its findings with record evidence." *Jin Shui Qui v. Ashcroft*, 329 F.3d 140, 149 (2d Cir. 2003).

Aliens in deportation proceedings have a constitutionally protected, Fifth Amendment, right

to due process. *Reno v. Flores*, 507 U.S. 292, 306, (1933); *Pyler v. Doe*, 457 U.S. 202, 210 (1982); *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000). The Fifth Amendment's due process clause mandates that removal proceedings be fundamentally fair. *Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004); citing *Flores*, 507 U.S. at 306; *Castandeda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993)

The Second Circuit has previously held that while "the Supreme Court has not specifically delineated the procedural safeguards to be accorded aliens in Deportation or removal hearings, it is well settled that the procedures employed must satisfy due process." *U.S. v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002), citing *Shaugnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). "Due process if flexible and calls for such procedural protections as the particular situation demands. "*Doe v. Simon*, 221 F.3d 137, 139 (2d Cir. 2000) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 484 (1972).

Among the due process rights which the 5th Amendment guarantees is the right to full and fair hearing of the alien's claims and a reasonable opportunity to present evidence on his/her behalf. *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002); citing *Colmear v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

In the instant matter, the failure to analyze the significance of the psychological/family assessment when the Second Circuit reasoned that there was no corroborating evidence concerning Colon's claimed memory loss, violated Ms. Colon's due process right to a fair hearing because the evidence was material. Indeed, the deficiencies cited in Ms. Colon's case were resolved by the psychological/family assessment.

The Second Circuit held that the IJ has the authority to develop the record; this explained why the IJ did not abuse her discretion in opening the line of Inquiry regarding whether Ms. Colon had disclosed her arrest or conviction on her adjustment of status application. However, the Court should have likewise held that the IJ's proactive inquiry should have extended to the weight she accorded the psychological/family assessment. There was no reason posited by the government or the IJ was to why the psychological/family assessment was not reliable or accurate. The Second Circuit has previously held that post-traumatic stress disorder can be a factor in a petitioner recalling the circumstances of a traumatic event. See *Bhuiyan v. Gonzales*, 231 Fed. Appx. 28, 32 (2d Cir. 2007)(unpublished)("...according to the evaluation, it is possible that [the petitioner] has difficulty remembering specific details regarding the injuries he sustained.); *Longwa v. Gonzales*, 193 Fed. Appx. 104, 106 (2d Cir. 2006)(unpublished)("The social worker provided an assessment indicating that Longwa suffered from post-traumatic stress disorder, a condition which could 'tremendously

affect his ability to lay out the details of his case.'"). The First Circuit has recognized that post-traumatic stress disorder can frequently interfere with memory. *Kawessa v. Gonzales*, 450 F.3d 62, 65 (1st Cir. 2006).

The Third Circuit has also addressed the significance that post-traumatic stress disorder has on memory. In *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003). The Court observed that:

> Another barrier to understanding the demeanor of petitioners who have experienced trauma is the likely repression of traumatic memories. Such repression only adds to the difficulty of answering questions. Their "detachment when recounting tragic events sometimes perceived as an indication of fabrication, may reflect psychological mechanism employed to cope with past traumatic experiences, rather then duplicity." Ruppel, *supra*, at 20; see also *Zubeda v. Ashcroft*, 333 F.3d 463, 477 (3d Cir. 2003). One such mechanism is pos-traumatic stress disorder, a disorder catalogued by the American Psychiatric Association in it's Diagnostic and Statistical Manual of Mental Disorders ("DSM") as having symptoms including "impaired memory, difficulty in concentrating and a numbing of responsiveness to the external world." Ruppel, at 20 (citing to the third edition of the DSM published in 1980). Various psychological responses to torture have been noted and catalogued in the Manual on the Effective Investigation and Documentation of Torture and

> Other Cruel, Inhuman or degrading Treatment or Punishment submitted to the United Nations Office of the High Commissioner for Human Rights. *Id.* at 477, n. 16.

Id. at 277.

Furthermore, the alien's right to present evidence on his behalf, in support of his claim for relief, is also set forth at INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4); 8 C.F.R. § 240.10(a)(4). An alien must be afforded a reasonable opportunity to present evidence on his behalf. *Agyeman*, 296 F.3d at 877 (9th Cir. 2002). The IJ must receive relevant evidence into the record. INA § 240(b)(2): U.S.C. § 1229a(b)(1).

In the instant matter, a report was prepared by Ruth Bermudez, LCSW, BCD, who is a New York State licensed clinical social worker. Ms. Bermudez is a member of the Academy of Certified Social Workers and a Board Certified Diplomat in Clinical Social Work. Ms. Bermudez is employed by the Department of Education where she provides crisis intervention, counseling and participates in multi-disciplinary special education evaluations. For 15 years prior to Ms. Colon's hearing, Ms. Bermudez maintained a private psychotherapy practice.

The assessment addressed, among other things, Ms. Colon's relationship with her ex-husband. The assessment stated that:

> In his desire to possess and totally control, her forbid her to work or go out and would monitor her everyday activities. At one point she couldn't

> even call her own brother. If he became aware that she had gone out, he would bat her up. During these hospitalizations she was forced to register with a different name. Wanting desperately to escape but with no place to go...she stayed quiet believing that he would actually kill her and her family. One day after coming home in a rage, he stabbed her (Ms. Colon has a big scar on her left wrist) and punched her in the mouth requiring her to get stitches to her lip and knocking out several teeth. In one violent struggle he cut the tendons of her fingers, which became partially paralyzed resulting in surgery. Glass was thrown at her resulting in a large scar on her right hand. In addition there were many beatings and punches on her head which she feels early on affected her memory. By this time a battered woman who was totally under his control, she did what he said and almost had no mind of her own.

In summary, Ms. Bermudez concluded that Ms. Colon was a battered woman who was suffering from Post Traumatic Stress Disorder as defined by the American Psychiatric Association's Diagnostic and Statistical Manual.

The Second Circuit refused to remand Ms. Colon's case to permit testimony from her sister-in-law, corroborating the above assessment. This evidence would have enabled Ms. Colon to more strongly and objectively establish that, not only was she a victim of domestic abuse, but that she suffered memory loss as a result of being a battered woman. The line of inquiry would have tied in the

psychological/family assessment with Ms. Colon's failure to remember her arrest and conviction - and help provide a connection between the disorder and the consequential memory loss, which has already been conclusively proven to be a likely by-product of Post Traumatic Stress Disorder.

It was a violation of due process for the Second Circuit to unreasonably prevent Ms. Colon from presenting evidence in support of her claim for relief, and to thereby prevent her from fully developing the record. It was manifestly unfair for the IJ to prevent Ms. Colon from presenting evidence that would help explain her memory loss by not permitting her to testify about the circumstances of her plea. This violation was compounded by Second Circuit's refusal to remand to permit Ms. Colon's sister-in-law to testify about the abuse that she witnessed occur to Ms. Colon.

In *Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003), the Court determined that where the IJ prevented the alien from presenting testimony that formed the heart of the alien's presentation, the alien's "most memorable testimony", testimony which corroborated the alien's claims, the Judge violated the alien's due process right. As the result of the prejudice suffered by the alien, the Court determined the deportation order had to be vacated. In *Kerciku*, the refusal of the IJ to accept the proposed evidence that was considered by the Board on appeal effectively precluded Mr. Rodriquez-Brito from presenting the "heart of his presentation" - testimony which would have corroborated his claim of extreme hardship to his children.

Like *Kerciku*, in the present case, the IJ, by refusing to accept evidence and depriving Ms. Colon the ability to explain the circumstances of her plea that related to her state of mind, effectively precluded her from exercising his right to present evidence which would have established her claim to relief. The remedy for such a violation is to hold a new hearing which is conducted in compliance with due process requirements, and which permit's the alien to present the relevant testimony. *Batanic v. INS*, 12 F.3d 622, 677 (7th Cir. 1993), cited in *Kerciku*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
August 13, 2009

Respectfully submitted,

ARTHUR LADDS, ESQ.
Counsel of Record
ATTORNEY AT LAW
521 Fifth Avenue
New York, New York 10175
(212) 292-4444
Attorney for Petitioner

APPENDIX
TABLE OF CONTENTS

Appendix Page

Summary Order of
The United States Court of Appeals for the
Second Circuit
entered May 15, 2009 ..... 1a

Decision of
The Board of Immigration Appeals
entered May 5, 2008 ..... 6a

Oral Decision of
The Immigration Judge
entered February 5, 2007 ..... 9a

Order of
The Immigration Judge
entered February 5, 2007 ..... 17a

Affidavit of
Doris Hernandez
sworn April 26, 2007 ..... 20a

[ENTERED: MAY 15, 2009]

08-2699-ag
Colon v. Holder

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the fifteenth day of May two thousand and nine.

PRESENT:

RALPH K. WINTER,
JOSÉ A. CABRANES,
SONIA SOTOMAYOR,
Circuit Judges.

MIRIAM ROSARIO COLON, a.k.a.
Annamaria Lopez,

Petitioner,

v. No. 08-2699-ag

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.[*]

FOR PETITIONER:
H. RAYMOND FASANO, Madeo & Fasano, New York, NY.

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[*] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney * General Eric. H. Holder, Jr. is automatically substituted for former Attorney General Michael B. Mukasey as respondent in this case.

FOR RESPONDENT:
JOHN W. BLAKELEY, Senior Litigation Counsel, Office of Immigration Litigation (Gregory G. Katsas, Assistant Attorney General, and Leslie McKay, Assistant Director, *on the brief*), U.S. Department of Justice, Washington, D.C.

Petition for review of a decision of the Board of Immigration Appeals.

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for review is **DENIED**.

Petitioner Miriam Colon seeks review of a May 5, 2008 decision by the Board of Immigration Appeals ("BIA"), which dismissed her appeal of a decision by an Immigration Judge ("IJ"), which in turn found her statutorily ineligible for cancellation of removal and a waiver under the now-repealed section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Although petitioner had become a permanent resident of the United States in 1991, the IJ determined that petitioner's failure to disclose an earlier conviction for the sale of a controlled substance during the application process meant that she was never admitted as a lawful permanent resident. In reaching her decision, the IJ noted that petitioner claimed to suffer from memory loss as a result of physical abuse,[1] and further claimed that it was because of her memory loss that she failed to disclose her conviction. The IJ stated,

[1] We note that petitioner also seemed to be claiming memory loss as a result of treatment she received for cancer. *See* J.A. 44.

however, that petitioner had submitted no medical evidence to support her claims. Because the IJ determined that petitioner was never a lawful resident, she determined that petitioner was statutorily ineligible for cancellation of removal and for § 212(c) relief. The BIA adopted and affirmed the decision of the IJ. We assume the parties' familiarity with the remaining factual and procedural history of the case.

On appeal, petitioner raises two issues: (1) that the BIA's failure to discuss petitioner's psychological assessment violated her right to due process of law because that assessment addressed the IJ's concern that there was no evidence to corroborate petitioner's claim of memory loss; and (2) that the BIA's decision not to remand the case in order to permit petitioner's sister-in-law to testify that petitioner was physically abused likewise violated due process.

At the outset we note that "[t]o establish a violation of due process, an alien must show that she was denied a full and fair opportunity to present her claims or that the IJ or BIA otherwise deprived her of fundamental fairness." *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (internal quotation marks omitted). Upon a review of the record, we conclude that both of petitioner's arguments are without merit.

First, petitioner's psychological assessment does not provide evidence to corroborate her claim of memory loss; it merely notes that petitioner believes that she has suffered memory loss. Specifically, the

report states that petitioner experienced physical abuse, "which she feels early on affected her memory" and that petitioner "recalls lapses in memory and difficulty retaining information." J.A. 348. And although the report does conclude that petitioner suffers from Posttraumatic Stress Disorder, it makes no connection between the disorder and memory loss. Accordingly, there can be nothing fundamentally unfair about the IJ's determination that there was no evidence to corroborate petitioner's claim of memory loss, nor in the BIA's determination not to reference the report.

Second, with respect to petitioner's argument regarding her request for a remand to allow her sister-in-law to provide testimony of her abuse, we note that there was already record evidence that petitioner was allegedly the victim of domestic violence, and neither the IJ nor the BIA ever questioned the legitimacy of petitioner's claims of abuse. Rather, the BIA simply determined that petitioner had not demonstrated why a remand for additional testimony was necessary. Based on the record before us, we cannot conclude that the BIA's decision denied petitioner a full and fair opportunity to present her claims, or deprived her of fundamental fairness. *See Burger*, 498 F.3d at 134.

For the reasons stated above, the petition for review is **DENIED**.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court
By _____ _____

[ENTERED: MAY 5, 2008]

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: MAY - 5 2008

File: A29 812 998 - New York, NY

In re: MIRIAM ROSARIO COLON
a.k.a. Annamaria Lopez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
H. Raymond Fasano, Esquire

ON BEHALF OF DHS:
Khalilah M. Taylor, Esquire
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Lodged: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact

APPLICATION: Section 212(c) waiver, cancellation of removal

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). The Immigration Judge did not abuse her discretion by initiating the inquiry into whether the respondent revealed her conviction when applying for adjustment of status. The Immigration Judge has a duty to develop the record, and this issue directly implicates the respondent's statutory eligibility for the relief she seeks. We also find no abuse of discretion in the Immigration Judge's denial of the respondent's request for a continuance during the pendency of proceedings to adopt her

granddaughter. We note that more than 18 months have passed and the respondent has not indicated that the adoption proceedings have been concluded. Finally, the respondent has not established that a remand is warranted to permit a witness to corroborate that the respondent was the victim of domestic violence at the time of her conviction. The respondent conceded that she procured adjustment by fraud or willfully misrepresenting a material fact, so any additional explanation about why she failed to disclose her conviction would not change the outcome of the proceedings. Moreover, the respondent had a sufficient opportunity to present such evidence and argument before the Immigration Court. For these reasons, the appeal is dismissed.

/s/_____
FOR THE BOARD

[ENTERED: FEBRUARY 5, 2007]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New York, New York

File A 29 812 998 February 5, 2007

In the Matter of

MIRIAM ROSARIO COLON,
Also Known as Ana Maria Lopez

Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Removal under Section 212(a)(2)(A)(i)(I) having been convicted of a crime relating to controlled substance violation and 212(a)(2)(A)(i)(I), alien who's been convicted of a crime involving moral turpitude.

APPLICATION: Cancellation of removal under Section 240A(a).

Waiver of excludability under Section 212(c)

ON BEHALF OF RESPONDENT:
H. Raymond Fasano, Esquire

ON BEHALF OF DHS:
Klalilah M. Taylor, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 52-year-old divorced female, native citizen of Bolivia who initially entered the United States as a visitor in 1982. She was subsequently admitted as a permanent resident based on her marriage to a U.S. citizen. The respondent applied for admission as returning lawful permanent resident on November 30, 2004. At that time, the Department did not admit her but instead issued a Notice to Appear charging her with being removable under Section 212(a)(2)(A)(i)(II) and 12(a)(2)(A)(i)(I) as an alien who has been convicted of a crime relating to controlled substance violation and who has been convicted of a crime of moral turpitude.

The respondent admitted the truth of the factual allegations contained in the Notice to Appear and in Form 261. Based on these admissions and concessions, the Court finds that removability has been established by clear, convincing and inequivocal evidence.

As relief from removal, the respondent seeks cancellation of removal under Section 240A(a) and relief under Section 212(c).

The respondent has offered documentation in support of her application. She has also testified in these proceedings.

The Court will first summarize the respondent's testimony.

The respondent testified that she was arrested relating to drugs in 1986. She was with her boyfriend, Fernando, at the time. She says that she pled guilty because she was afraid and because she was involve. The plea occurred in 1986. She was sentenced in 2004. She doesn't know why it took so long for her to be sentenced.

She says that she was arrested in Miami. This was when she went to get her daughter. She paid a $2,000 fine and went to court with her lawyer.

The respondent has an older brother living in the United States. He's apparently file an N-400 applying for naturalization. Her aunt is a U.S. citizen. She has a granddaughter, Kiria, who's a permanent resident. Her daughter is presently living in Bolivia with her boyfriend. She has lived there for several years.

At the time of the respondent's last hearing, she did not have legal custody of her granddaughter. She only had a letter from the mother indicating that she approve of her being with her grandmother.

The respondent says that she has been employed in the United States and had paid taxes.

During cross examination, the respondent testified that she knew that her boyfriend used and sold drugs and she was arrested the first time she was involved in it. She says that she didn't know

how to go back to court, that she kept moving around because of her boyfriend. The Judge told her that she had to return for a sentencing but she said she didn't understand it well. She was asked what she thought happened to the case and she says that she thought it over but didn't know. She was asked if she thought there was no punishment for this crime. She says that she thought the case was closed because she had pled guilty.

In 2004, the respondent received probation of five years that would be until 2004. She is required to make monthly visits to a probation officer, behave well, not travel and submit to random drug tests.

The respondent has her mother and father living in Bolivia. She says that both of them are ill. Her daughter lives in Bolivia as does a younger sister. Another siblings lives in Argentina and that the half-sibling lives in Bolivia.

The respondent says that she came with a visitor visa in to 1982. In 1991, she became a permanent resident through her husband's petition who is a U.S. citizen.

The respondent's says that her granddaughter has lived with her since her birth in the United States. The respondent have returned to Bolivia on approximately seven occasions. The longest she has been in Bolivia is for three months.

The respondent was asked about her arrest when she filled out her application for adjustment of status. She says she doesn't remember. She was

asked if she told at the interview that she had been arrested, she says they didn't ask but then she says she didn't remember.

During redirect, the respondent says that she trouble remembering because a man beat her in her head.

During recross, the respondent says that she has never received any specific medical diagnosis for this. She says that she did suffer from cancer in 1992. She says that this caused forgetfulness. This illness occurred in 1991.

The respondent made an oral offer proof regarding a witness who would state that he knows her for 18 years.

The respondent offered the following documents in support of her application. She offered a copy of her alien registration card, a social security statement, a photocopy of her lease, a letter from her Bank, evidence of employment, evidence of tax returns and tax payments, a letter from her granddaughter's school, a psycho social family assessment, letters of reference or good character from her aunt and friends, a letter from her church, a letter indicating that she now has custody of her granddaughter. The Department offered copies of the I-130, I-485 and N-400, filed and signed by the respondent. The respondent today has offered a letter from an attorney who represents her in family court for the adoption of her granddaughter.

The respondent had made a request for an adjournment so that the adoption could be finalized. The Court has denied that adjournment as no time frame has been given. The Court also notes that this case quite old at this point and the proceedings to adopt the granddaughter only began after the last hearing, after the respondent became aware that she probably didn't have any relief under the Immigration Act.

While the respondent has equity in the United States, the Court cannot make the decision regarding the affect of these equities on her ability to stay in the United States because she is statutorily ineligible for any of the relief she has sought. The respondent became a permanent resident in 1991 after she had plead guilty to criminal charges relating to drugs. She did not disclose this arrest or conviction on her application for adjustment of status or on her application for citizenship. The respondent's explanation is that she didn't remember these things because of medical treatment she received in 1991. The respondent has offered no evidence that she had any problems with, any medical evidence of her memory problems. The Court notes that the respondent signed both an application for adjustment of status upon preparation and after being interviewed according to the interviewers markings, she was asked whether she had ever been arrested. The respondent has offered no allegation. She did not understand the questions on either her I-485 or her N-400, asking whether she had ever been arrested and convicted in the United States.

The respondent's failure to disclose the fact that she had pled guilty to attempted criminal sale of controlled substance establishes that she, in fact, has never been admitted as a lawful permanent resident. The disclosure of this arrest certainly would have opened a line of inquiry which might have established that the respondent was in fact not eligible for adjustment because of the conviction. As the respondent has never been lawfully admitted as a permanent resident, she is not eligible for either cancellation of removal under Section 240A(a) or for relief under Section 212(c). Matter of Kolomatangi, 23 I&N Dec. 548, in that case the Board held that an alien who required permanent resident through fraud has never been admitted for lawful permanent residence and is not eligible for cancellation of removal under Section 240A. Matter of T-, 6 I&N Dec. 136, makes the same finding regarding eligibility for relief under Section 212(c). As the respondent has never been lawfully admitted for permanent residence, the Court must find that she is statutorily ineligible for relief under Section 240A(a) or for relief under Section 212(c). According the following orders will be entered.

ORDER

IT IS ORDERED that the application for cancellation under Section 240A(a) is hereby denied.

ORDER

IT IS FURTHER ORDERED that relief under Section 212(c) is hereby denied.

ORDER

IT IS FURTHER ORDERED that respondent be removed from the United States to Bolivia on the charge contained in the Notice to Appear.

/s Barbara A. Nelson
BARBARA A. NELSON
Immigration Judge

[ENTERED: FEBRUARY 5, 2007]

IMMIGRATION COURT
26 FEDERAL PLZ 12TH FL., RM1237
NEW YORK, NY 10278

In the Matter of

Case No.: A29-812-998

COLON MIRIAM ROSARIO
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on February 5, 2007. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Bolivia

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to ____, or in the alternative to_____.

[ ] Respondent's application for voluntary departure was granted until ____ upon posting a bond in the amount of $____ with an alternated order of removal to ____

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn

[X] A Waiver under Section 212(c) was ( ) granted (X) denied ( ) withdrawn

[X] Cancellation under Section 240A(a) was ( ) granted (X) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under Section 240A(b)(i) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give affect to this order.

[ ] Cancellation under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give affect to this order.

[ ] Adjustment of States under Section ____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give affect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until ____.

[ ] As a condition of admission, respondent is to post a $____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other:_____
Date: 2-5-07

/s/ Barbara A. Nelson
BARBARA A. NELSON
Immigration Judge

Appeal: Waived (Reserved by resp)
Appeal Due By: 3-7-07

ALIEN NUMBER: 29-812-998
ALIEN NAME: COLON MIRIAM ROSARIO

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M)
[X] PERSONAL SERVICE (P)
TO: [X] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN'S ATT/REP [X] INS
DATE: 2-5-07 BY: COURT STAFF /s/

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

STATE OF NEW YORK

COUNTY OF NEW YORK

Doris Hernandez, being duly sworn, states the following under the penalties of perjury:

1. I am a naturalized United States Citizen. I reside at 59-10 Queens Blvd, Apt. 7C, Woodside, NY 11377. I submit this affidavit in support of my sister-in-law, Miriam Colon.

2. I am married to Miriam's brother, Adolofo Guevara. Adolfo and I have been separated for many years.

3. I have not had contact with Miriam for several years due to the fact that her brother and I are no longer living together. In February 2007, Miriam and I had an opportunity to talk during my son's wedding. During our conversation, Miriam confided in me about her 1986 conviction and her immigration problems.

4. I recall from 1985 until 1986 Miriam was dating a man that I suspected was abusing her. I would often see Miriam with bruises about her face and body. When I pressured Miriam to tell me if he was beating her, she stopped talking to me. The most serious injuries included wounds that I suspected were the result of Miriam being stabbed. Miriam denied being stabbed and claimed to have been cut by broken glass. Recently Miriam confided in me that her boyfriend had stabbed her in the hand.

5. Miriam has now confided in me that her ex-boyfriend frequently beat her and that she feared him.

6. Had I known that Miriam had immigration problems I would have appeared in Court as a factual witness regarding Miriam's relationship with her ex-boyfriend.

/s/ Doris Hernandez
Doris Hernandez

Sworn to before me this
26th day of April, 2007

/s/
NOTARY PUBLIC

HENRY R. FASANO
Notary Public, State of New York
No. 01SA5055143
Qualified in Suffolk County
Commission Expires February 5, 2010